
No. 224.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

NORTHERN PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

VS.

FRANK PAUSON,
Defendant in Error.

Brief for Plaintiff in Error.

JOSEPH D. REDDING,
Attorney for Plaintiff in Error.

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STATEMENT OF THE CASE.

This is a suit for damages (record, pages 2 and 3).

The plaintiff, by his complaint, sets forth, in substance, that on the 6th day of September, 1892, he became and was a passenger upon the defendant's train running from the city of Seattle to the city of Portland, was thereon for the purpose of being transported from Seattle to Portland, and had paid his fare.

“ V.

“ That while plaintiff was, as aforesaid, a passenger upon the said train of the defendant, the defendant wrongfully, maliciously, wantonly and wilfully assaulted, insulted and maltreated the plaintiff, and by force and arms ejected him from the said train.

“ VI.

“ That, by reason of the said acts of the defendant, the plaintiff suffered both physical and mental injuries.”

The plaintiff prayed for a judgment of ten thousand (\$10,000) dollars.

The answer of the defendant (26 *et seq.*) contains a specific denial of all of the allegations of the complaint. The jury returned a verdict in favor of the plaintiff and assessed the damages at the sum of three hundred and ten (\$310) dollars, upon which judgment was rendered for the plaintiff. The case comes into this court upon defendant's bill of exceptions, approved, allowed and settled by the trial court (138), and upon a writ of error and assignment of errors, also allowed (149).

The facts of this case, in brief, and as they appear in the bill of exceptions (32-131), are as follows. In setting them forth I will make a concise abstract or statement of the same with reference to the particular errors assigned and urged.

Plaintiff Frank Pauson was a merchant, a member of the firm of Hyams, Pauson & Co., engaged in business in San Francisco, and also in Seattle and Tacoma.

In September, 1892, he purchased a limited round-trip tourist ticket for ten (\$10) dollars, good for one first-class passage from Portland, Oregon, to Seattle, Washington, and return. He went from Portland to Seattle, using one-half of the ticket. On the evening of September 6th, 1892, he proceeded to return from Seattle to Portland. The conditions of the ticket (Exhibit A) with reference to the return passage are as follows:

“ 3d. On or one day before departure, returning, and
 “ in sufficient time to permit of arrival at destination
 “ before midnight of date punched in margin hereof,
 “ the holder must be identified as the original pur-
 “ chaser of this ticket by writing his or her signature
 “ on the back hereof, and by other means if necessary,
 “ in the presence of the ticket agent of the Northern
 “ Pacific Railroad at Seattle, Wash., who will witness
 “ the same, otherwise it will not be honored for
 “ passage.”

At the bottom of the ticket, and as a part thereof, occurs the following:

“ TO PURCHASER: Read the above contract, and
 “ take notice that the return part of this ticket must be
 “ stamped, and your signature witnessed in the manner
 “ prescribed, before it will be honored for passage.”

It is admitted that the plaintiff stepped aboard the train about ten o'clock on the evening of September 6th, at Seattle, without his ticket being stamped or his signature being witnessed by the ticket agent. The plaintiff also had a Pullman check for his berth. He retired to his berth upon the train starting

and went to sleep; the conductor, J. W. Stamper, awoke him and asked for his ticket. The plaintiff handed him "Exhibit A" (35). The conductor told him that he could not ride on the ticket, as it was not stamped nor was the signature of the plaintiff witnessed by the ticket agent. The plaintiff looked at the ticket and saw that there was no stamp upon it. He endeavored to explain the matter to the conductor. The conductor said that the explanation would make no difference: that the ticket was one upon which the plaintiff could not ride. They talked the matter over and the conductor further said that the plaintiff would either have to pay his fare or get off. The plaintiff dressed, and at the first station at which the train stopped, namely, Kent, went with the conductor, whom the plaintiff acknowledges treated him in the mildest and fairest manner possible (62) onto the platform. There is a conflict in the evidence as to whether the plaintiff reached the platform of the depot or remained on the platform of the car, but, immediately after arriving upon the platform, the plaintiff told the conductor, "I think I had better pay my fare and go on." He went on the train and paid his fare to the next station at which there was an agent who could witness his signature, namely, at Tacoma. The conductor gave Mr. Pauson, the plaintiff, a receipt for the fare from Kent to Tacoma, which was in the neighborhood of two (\$2.00) dollars, and told the plaintiff that if he would go with him, the conductor, to the ticket office at Tacoma, the matter could be fixed (52). The plaintiff, when they reached Tacoma, went with the conductor to

the ticket office, but then and there refused to have the matter fixed up, and purchased an additional ticket from Tacoma back to Portland. He then returned to his berth upon the train and reached Portland without delay.

The plaintiff and his counsel both admit that there were no acts of violence of any kind or undue force used upon plaintiff by any of the employees or officers of the defendant. The plaintiff endeavored to produce the impression upon the jury that he was subjected to violent language, and that his nervous system became deranged, and that he became mentally very much excited on account of the transaction. The plaintiff's testimony, however, on this point and particularly on cross-examination (59-62), was so contradictory and ambiguous that the trial court (Hon. Joseph McKenna) put several questions to the plaintiff, particularly as follows (62):

“ Q. *By the Court*—You consider that the conductor's manner was offensive outside of the act. Mark the distinction: being put off the train is one thing, and the manner is another thing.

“ A. I expect he treated me fair enough in putting me off, in that respect. If it was his duty to put me off, considering it perhaps, he could not have done it much milder.”

This is the whole of the plaintiff's case, with the exception of his testimony and that of two other witnesses called for the plaintiff as to what occurred at the office of the defendant at Seattle prior to the departure of the train. The plaintiff testified, and also

told the conductor, that he had taken his ticket to the agent at Seattle and had signed his ticket in the presence of the agent, but that the agent had failed to witness his signature and stamp the same. The conductor replied in effect that he was guided by his rules; that he knew his business, and the ticket as presented to him was not in condition to be accepted as fare.

This statement of the case is sufficient to place before the appellate court the fourth assignment of error, which is as follows:

“ IV.

“ The Court erred at the trial of this cause in refusing to instruct the jury, at the close of the testimony of the plaintiff, to render a verdict for the defendant. At the close of the plaintiff’s case the defendant moved the Court, upon the trial of this cause, to instruct the jury that, upon the evidence offered by the plaintiff, it was their duty as a matter of law to find a verdict for the defendant. The defendant, upon said motion, referred to the entire testimony offered by the plaintiff, and the full substance thereof, and the defendant based its motion upon the following grounds:

“ (a) That in this action the plaintiff sued the defendant in *tort*, alleging that, on the 6th day of September, 1892, while he was a passenger upon the defendant’s train running between Portland and Seattle, the defendant wrongfully, maliciously, wantonly and wilfully assaulted, insulted and maltreated him, and, by force of arms, ejected him from the train, causing the plaintiff to suffer both physical and mental injuries in the sum of ten thousand (\$10,000)

“ dollars damages. That all the evidence of the plain-
“ tiff’s case showed that all of the servants, agents and
“ employees of the defendant had caused the plaintiff
“ no bodily harm of any kind. On the contrary, that,
“ according to the plaintiff’s own testimony, the treat-
“ ment given him could not have been milder.

“ (b) That the evidence of the plaintiff’s case, and all
“ thereof, showed that when he presented his ticket to
“ the conductor of the train, between Seattle and
“ Tacoma, the ticket offered was a limited first-class
“ ticket, having special provisions and conditions
“ thereon, among which were the conditions and provi-
“ sions that the ticket should be signed by the person
“ claiming to own the same, and witnessed and stamped
“ at Seattle by an agent of the defendant; that the
“ ticket, as presented to the conductor, was not wit-
“ nessed and was not stamped, but was irregular and
“ incomplete on its face; that the conductor was not
“ authorized to accept the statement of the plaintiff
“ showing why this ticket was defective, but it was his
“ (the conductor’s) duty to demand fare of the plaintiff,
“ and, if refused, to put the plaintiff off at the nearest
“ regular station.

“ (c) That the evidence of the plaintiff’s case, and all
“ thereof, showed that the plaintiff offered to pay his
“ fare to Tacoma to the conductor, and did pay his fare
“ to the conductor, from Kent to Tacoma, and accepted
“ the proposition made by the conductor to him on that
“ behalf, and accepted the offer made by the conductor
“ to adjust the matter and correct the ticket before the
“ agent at Tacoma.

“(d) That the evidence of the plaintiff’s case, and
“ all thereof, showed that,* by the act of the plaintiff
“ paying his fare between Kent and Tacoma, and
“ accepting the proposition made by the conductor, he
“ (the plaintiff) was enabled to proceed upon his journey
“ without any delay or inconvenience, and did reach his
“ destination on time and without any bodily or mental
“ injury or loss of time or money or detriment to
“ business.

“(e) That the ticket introduced by the plaintiff,
“ upon which he claimed to be a passenger upon the
“ train of the defendant, was a defective ticket, and not
“ such a ticket as could be accepted by the conductor,
“ or such a ticket upon which the plaintiff was entitled
“ to ride, and that the conductor was justified in put-
“ ting the plaintiff off the train if he did not pay his
“ fare.

“(f) That in this form of action, based upon *tort*
“ in the alleged wilful ejection of the plaintiff by the
“ agents and servants of the defendant, it was not com-
“ petent evidence for the conductor to receive the oral
“ statements of the plaintiff why the ticket was defec-
“ tive, but he (the conductor) was confined to the
“ condition of the ticket itself; that the allegations in
“ the plaintiff’s complaint and his cause of action, as
“ therein set forth, confined him to the transactions
“ and occurrences which took place from the time of his
“ presenting his ticket to the conductor of the defen-
“ dant and thereafter, and could not be strengthened by
“ any testimony with reference to events prior thereto.

“ To which refusal of the Court to give the above
 “ instructions to the jury, and upon the grounds herein
 “ specified, the defendant duly excepted and now
 “ assigns as error.”

ARGUMENT ON FOURTH ASSIGNMENT OF ERROR.

This is an action for *tort*, not one *ex contractu*. The case must be considered with reference to the condition of the ticket at the time it was presented to the conductor.

The conductor of the defendant's train, upon the plaintiff presenting a ticket bearing no stamp of the agent and not having the signature witnessed, had no authority to waive any condition of the contract, to dispense with the want of such stamp, to inquire into the previous circumstances, or to permit him to travel on the train.

Mosher vs. Railroad Company, 127 U. S., 390.

As the United States Supreme Court says in that case :

“ It would be inconsistent alike with the express
 “ terms of the contract of the parties, and with the
 “ proper performance of the duties of the conductor, in
 “ examining the tickets of other passengers, and in
 “ conducting his train with due regard to speed and
 “ safety, that he should undertake to determine from
 “ oral statements of the passenger, or other evidence,
 “ facts alleged to have taken place before the beginning
 “ of the return trip, and as to which the contract on the
 “ face of the ticket made the stamp of the agent of the

“ Hot Springs Railroad Company at Hot Springs the
“ only and conclusive proof.”

This would seem to be determinative of the plaintiff's rights in this action. In this case last cited, which was like the case at bar, one in *tort*, it appeared that there was no agent at the office at Hot Springs to whom the plaintiff could identify himself. The Supreme Court upon that point says :

“ If this defendant had been the party responsible for
“ not having an agent at Hot Springs, the question
“ thus presented would have been of some difficulty,
“ although we are not prepared to hold that, even
“ under such circumstances, *the plaintiff's remedy*
“ *would not have been limited to an action for the breach*
“ *of the implied contract to have an agent here, and to*
“ *the expense which he thereby incurred.*”

Here the Supreme Court suggests the distinction which we submit is the important one to make in the case at bar, which is that, if the plaintiff is to rely upon any default or failure of duty on the part of the defendant's agents at the ticket office, he must proceed *ex contractu*. If he proceeds in *tort* in this case, then the conductor's duties are imperative. He cannot undertake to determine from oral statements of the passenger, or other evidence, facts alleged to have taken place before the beginning of the return trip. His duty is to inspect the ticket and to see that its conditions have been fulfilled. If they have not, then there is no *tort* or cause of action arising in his calling upon the plaintiff to pay his fare, or, upon his failure so to do, to remove him from the train at the next regular station, using no more force than is necessary.

In the case of

Railroad vs. Winter, 143 U. S., 60,

the Supreme Court holds that, if the ticket does not state its conditions upon its face, then the passenger is not supposed to know all of the rules and regulations with reference to stop-over privileges; but, if the conditions of the contract appear upon the ticket, he is of course presumed to know them and to be guided by them.

In the *Winter* case the facts show that the plaintiff became the owner of an *unlimited* first-class ticket entitling him to ride from B to S. That, at the time he took passage on the defendant's train at B, he had the agent punch his ticket so that he was entitled to stop over at O. That he did stop over at O and the next day took a train for S. The conductor on the last-named train refused to accept his ticket, but demanded payment from O to S, and, upon plaintiff's refusal to pay the same, *forcibly* ejected him from the car, whereby his finger was broken and other severe and painful injuries were sustained. At the time that the plaintiff asked the agent at B for a stop-over privilege at O, the agent told him he could do so by paying three (\$3.00) dollars more and by speaking to the conductor. The second conductor, who put him off the train, was called and testified among other things that he thought the plaintiff had a *limited* ticket instead of one *unlimited*. The facts showed that none of the conditions of the contract of carriage with reference to stop-over privileges appeared upon the plaintiff's ticket. He obtained his stop-over privileges from the ticket agent at Bim-

lington, who punched his ticket for that purpose before he entered the train. The Supreme Court held that the testimony with reference to this transaction was admissible. The Court says :

“ In this case there is no evidence, as already stated, “ that notice or knowledge of the existence of the rules “ of the defendant company, or what they were, with “ respect to stop-over privileges, was brought home to “ the plaintiff at the time he purchased his ticket, or at “ any time thereafter. There was nothing on the face “ of the ticket to show that a stop-over check was re- “ quired of the passenger as a condition precedent to “ his resuming his journey from Olean to Salamanca, “ after stopping off at the former place.”

The facts in the case at bar are directly to the contrary. The condition precedent to Pauson resuming his journey from Seattle to Portland appeared on the face of the ticket. The ticket was a limited one, given with particular conditions. Everything with reference to Pauson's right to ride either way on the ticket appeared upon the ticket itself. No variation of its terms could be made either by an act of omission or commission on the part of an agent of the defendant, nor could the conductor accept the oral statements of Pauson as to why he presented a defective ticket for fare.

The face of a railway ticket is conclusive evidence to the conductor of the contract between the passenger, and the company and the purchaser of a defective ticket who is ejected from a train must rely upon his action against the company for the negligent mistake of the ticket agent.

Pouillin vs. Canadian Pacific Ry. Co., Circuit Court of Appeals, 52 Fed. Rep., 197.

Railway Co. vs. Bennett, 50 Fed. Rep., 496, 1 C. C. A., 544.

The Circuit Court of Appeals says in the Pouillin case :

“ The law settled by the great weight of authority, “ and but recently declared in a case in this court, “ (*Railway Co. vs. Bennett*, 50 Fed. Rep., 496, 1 C. C. “ A., 544), is that the face of the ticket is conclusive “ evidence to the conductor of the terms of the contract “ of carriage between the passenger and the company. “ The reason for this is found in the impossibility of “ operating railways on any other principle, with a due “ regard to the convenience and safety of the rest of the “ traveling public, or the proper security of the com- “ pany in collecting its fares. The conductor cannot “ decide from the statement of the passenger what his “ verbal contract with the ticket agent was, in the “ absence of the counter evidence of the agent. To do “ so would take more time than a conductor can spare “ in the proper and safe discharge of his manifold and “ important duties, and it would render the company “ constantly subject to fraud and consequent loss. The “ passenger must submit to the inconvenience of either “ paying his fare or ejection, and rely upon his remedy “ in damages against the company for the negligent “ mistake of the ticket agent. There is some conflict “ among the authorities, but the great weight of them is “ in favor of the result here stated.”

Bradshaw vs. Railroad, 135 Mass., 407.

Townsend vs. Railroad, 56 N. Y., 295.

Frederick vs. Railroad Co., 37 Mich., 342.
Shelton vs. Railway Co., 29 Ohio St., 214.
Dietrich vs. Railroad Co., 71 Pa. St., 432.
Petrie vs. Railroad Co., 42 N. J. Law, 449.
Railroad Co. vs. Griffin, 68 Ill., 499.
Hall vs. Railway Co., 15 Fed. Rep., 57.
Pennington vs. Railroad Co., 62 M. D., 95.
Johnson vs. Railroad Co., 63 Md., 106.
 Mechem's Hutch. Car., Sec. 5801.

We submit, therefore, that in the fourth assignment of error the Court erred, as defendant sets forth, in not instructing the jury at the close of the plaintiff's case to find for the defendant.

At the close of the entire case, the defendant again requested the Court to instruct the jury to render a verdict for the defendant, and upon the refusal of the Court so to do the defendant excepted and assigns as error (146) fifth assignment of error.

The additional evidence adduced upon the defendant's case with reference to the alleged ejection of Pauson is found in the testimony of J. W. Stamper, the conductor (72-110), and W. C. Babcock, the brakeman (110-119). The evidence of Mr. Stamper, the conductor (74), shows that at the time he called for Mr. Pauson's ticket and found that it was defective he stated to him that

" if he would deposit it with me, the amount of the
 " fare from Seattle to Tacoma, that when we reached
 " Tacoma I would go with him to our station agent
 " there and have him endorse or stamp and witness
 " the ticket, and that I would make him a refund of

“ the amount of the fare between Seattle and Tacoma,
 “ which was \$1.35.”

To this proposition Pauson at first said no. After they had proceeded out of the car at Kent and on to the platform of the car, and while Pauson was on the lower step of the platform, the conductor testified that the following occurrences took place (75) :

“ Upon reaching there he looked out around, out
 “ there, kind of taking in the situation, and he said,
 “ ‘ I dislike the idea of stopping here to-night.’ I
 “ says: ‘ Well, Mr. Pauson, I dislike the idea of leaving
 “ ‘ you here, but, if you will persist in refusing to
 “ ‘ comply with the proposition I have made, there
 “ ‘ is nothing else for me to do. I cannot honor
 “ ‘ the ticket in the shape it is in.’ He says, ‘ Very
 “ ‘ well, I will give you the fare.’ He put his hand
 “ in his pocket and gave me a twenty-dollar gold
 “ piece and turned around and went back into the
 “ sleeper. I spoke to one of the brakemen and told
 “ him to return the valise to the sleeper, and he did so,
 “ and I preceded the brakeman into the sleeper, I
 “ think, after giving him instructions to take the
 “ valise in, and I told Mr. Pauson then that I had not
 “ sufficient change for the money but I would get it for
 “ him in a few moments and give him the change. He
 “ replied to this that it did not make any difference, as
 “ I was going to make a refund anyway when I got to
 “ Tacoma—just to keep it until I got to Tacoma. This
 “ I did, and Mr. Pauson and I had some other conver-
 “ sation there—I do not pretend to say that I remember
 “ it all, but I remember that he asked me if I knew

“ the boys at Seattle who were in charge of his business there. I told him I was slightly acquainted with some of them ; that I had patronized his store to some extent, and knew Mr. Redelsheimer, the manager, slightly, and he said, ‘ Well, when you go back on your return trip, if it is not too much out of your way, or if convenient to you, I wish you would go in and tell the boys about this little occurrence,’ and he remarked also that he did not entertain any ill feeling—he realized the position in which I was placed, and he considered I was simply performing my duties. That, I believe, is all the conversation until we reached Tacoma, the end of my run. When we arrived at the station there, I went back to the sleeper to accompany Mr. Pauson to the ticket office, and we walked over to the ticket office, and he says: ‘ Conductor, I guess you can take out the amount of your fare between Seattle and here. I will buy another ticket through to Portland, and not use this one at all.’ I says: ‘ Very well ; if you want me to do so I will ;’ but I says, ‘ It is entirely unnecessary, as the ticket can be fixed up here all right, and I will give you a refund of the money and cancel the ticket for my portion of the run, and it will be good for the return portion.’ He says, ‘ No, take out the amount of your fare, and I will not use the ticket at all.’ We then went into the ticket office, and I got change for the money from the ticket agent in the office and retained my \$1.35, and gave him the change with a receipt and rebate for \$.25. I then left Mr. Pauson.”

This proposition on the part of the conductor to adjust the matter with Mr. Pauson occurred at the berth and prior to Mr. Pauson stepping out onto the platform of the car. The conductor's testimony remains unshaken on this point (88, 89).

The former evidence in the defendant's case corroborates that of the plaintiff's, to the effect that the entire proceedings were quiet and orderly; that Mr. Pauson reached his ultimate destination without delay and without personal inconvenience; that when he went with the conductor to the ticket agent at Seattle, with the understanding that the matter would be adjusted, concluded not to adjust it, but to buy a further ticket from Seattle to Portland. His journey was not interrupted, and he arrived at his destination on time and upon the same train upon which he left Seattle.

We submit that paragraph *d*, in assignment of error numbers 4 and 5 (145), sets forth a further ground upon which the judgment should be reversed and rendered in favor of the defendant. This assignment is upon the point that the evidence in the whole case shows that the plaintiff accepted the proposition made by the conductor, namely, to pay his fare between Kent and Tacoma, and thereupon to adjust his original ticket at Tacoma in the presence of the agent by having his signature witnessed and the ticket stamped. This opportunity being offered him, and he accepting it, his subsequent refusal to adjust it at Tacoma is a voluntary act on his own part, and he has no cause of action. No citation of authorities is necessary upon this point, it being plain that the acts of the plaintiff

“ the boys at Seattle who were in charge of his business there. I told him *I was slightly acquainted with some of them; that I had patronized his store to some extent, and knew Mr. Redelsheimer, the manager, slightly, and he said, ‘ Well, when you go back on your return trip, if it is not too much out of your way, or if convenient to you, I wish you would go in and tell the boys about this little occurrence,’ and he remarked also that he did not entertain any ill feeling—he realized the position in which I was placed, and he considered I was simply performing my duties. That, I believe, is all the conversation until we reached Tacoma, the end of my run. When we arrived at the station there, I went back to the sleeper to accompany Mr. Pauson to the ticket office, and we walked over to the ticket office, and he says: ‘ Conductor, I guess you can take out the amount of your fare between Seattle and here. I will buy another ticket through to Portland, and not use this one at all.’ I says: ‘ Very well; if you want me to do so I will;’ but I says, ‘ It is entirely unnecessary, as the ticket can be fixed up here all right, and I will give you a refund of the money and cancel the ticket for my portion of the run, and it will be good for the return portion.’ He says, ‘ No, take out the amount of your fare, and I will not use the ticket at all.’ We then went into the ticket office, and I got change for the money from the ticket agent in the office and retained my \$1.35, and gave him the change with a receipt and rebate for \$.25. I then left Mr. Pauson.”

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himself show that upon his arrival at Tacoma he concluded to manufacture a case against the defendant. His conversation with the conductor on the train showed that he was in good humor; he told the conductor that, when he returned to Seattle, to tell the boys in the store of the occurrence, and they chatted pleasantly. This was at the time he had concluded to pay his fare between Kent and Tacoma. Then, when he reached Tacoma, the plaintiff made up his mind not to carry out the arrangement suggested by the conductor, but to buy an additional ticket from Tacoma to Portland.

The motion of the defendant at the close of the whole case that the jury should be instructed to find for the defendant upon this evidence should have been granted.

The seventh assignment of error is as follows (148):

“The Court erred at the trial of this cause in giving
“the following instructions to the jury, and each and
“every part of the same:

“ ‘Therefore, it was the duty of the plaintiff to pre-
“ ‘sent the ticket to the agent for signing and witness-
“ ‘ing and stamping. When it was presented and
“ ‘signed, it was the duty of the agent to witness and
“ ‘stamp it. There is a controversy between the
“ ‘plaintiff and defendant as to what was done, which
“ ‘you are to decide from the testimony, and if
“ ‘you find from the testimony and evidence that
“ ‘the plaintiff did present himself to an agent
“ ‘and sign the ticket in his (the agent’s) presence,
“ ‘and the agent took the ticket and returned it, in
“ ‘such a way and under such circumstances as to

“ ‘justify plaintiff in believing that he, the agent, had
 “ ‘witnessed and stamped the ticket, and plaintiff, so
 “ ‘believing, entered the train, he was a legal passen-
 “ ‘ger; and if you find from the evidence, further,
 “ ‘that he explained to the conductor the circum-
 “ ‘stances, he had the right to refuse to pay or deposit
 “ ‘there with the conductor, and his removal from the
 “ ‘train, if you find from the evidence he was re-
 “ ‘moved, was unlawful,’ for the reason that it in-
 “ ‘structed the jury that the conductor should receive
 “ ‘the testimony of plaintiff showing the defective con-
 “ ‘dition of his ticket, and should be guided by such
 “ ‘testimony and oral statements. This being an action
 “ ‘in *tort*, based on the acts of the defendant’s employees
 “ ‘on the train, and not an action on the contract for
 “ ‘the acts or omissions of the agent of the defendant
 “ ‘at Seattle, said instruction is erroneous, and excep-
 “ ‘tion to the same was duly taken by the defendant
 “ ‘and allowed, and the same and all thereof is now
 “ ‘assigned as error.’”

The Court (Judge McKenna) stated that it had grave doubts as to giving this instruction. There was a former trial of this case before Judge Beatty and a jury, which is referred to by Judge McKenna on page 132 of the record. The first trial resulted in a disagreement of the jury, but the instructions given by Judge Beatty were in conformity with the position taken by the plaintiff in error before this Honorable Court of Appeals. Judge McKenna says, on page 132:

“ ‘It seems to me (adhering to the views I expressed
 “ ‘the other day, and I have had no chance to review

